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No. 00-621

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL A. JACKSON, *Petitioner,*

v.

JEANNE WOODFORD, Warden, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Capital Case

QUESTIONS PRESENTED

1. Whether the federal court of appeals reached the wrong result in applying this Court's standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), to the particular facts of trial counsel's investigation and presentation of evidence in the guilt-phase of petitioner's death-penalty.

2. Whether the court of appeals may review deferentially a district court's discretionary decision to deny appointment of a third medical expert to a state prisoner in federal habeas corpus proceedings, where the district court's decision might have been affected by its view that the petitioner was required to prove his "freestanding" habeas corpus claim of "factual innocence" either "beyond a reasonable doubt" or by "clear and convincing" evidence.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Warden of the California State Prison at San Quentin files this Opposition to the Petition for Writ of Certiorari filed by petitioner Michael Anthony Jackson in this case.[1]

STATEMENT OF THE CASE

1. The Crime.

Petitioner Michael Jackson shot and killed a young policeman, Officer Kenneth Wrede, during a violent street confrontation in West Covina, California, in August 1983. The confrontation began when Officer Wrede approached Jackson after several onlookers had reported Jackson behaving very strangely—jumping and diving and yelling—on the sidewalks of the residential neighborhood. It escalated when Jackson physically attacked the officer, kicking and punching him and wrestling him to the ground. It became critical minutes later in a deadly cat-and-mouse game, played out on each side of a police patrol car, with Officer Wrede pointing his revolver at

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[1] At the time of the proceedings below, the respondent warden in this case was Arthur Calderon. Jeanne Woodford is the warden now.

Jackson and Jackson pointing the policeman's own shotgun, wrenched from the patrol car by Jackson, at the officer. It ended tragically when—after Jackson had seemingly relented by laying down the shotgun and resting his head on the roof of the patrol car—he suddenly raised the shotgun, fired, and shot Officer Wrede dead. In the denouement, other police officers arrived, moments too late, and subdued and arrested Jackson in another struggle, but only after he had threatened to "kill" them with the shotgun and only after he had been bitten and disarmed by an attacking police dog.

2. The State Criminal Proceedings.

The State prosecuted Jackson for premeditated and deliberate first-degree murder of a peace officer engaged in his duties, a capital offense. At his trial, Jackson never denied he was the killer; instead, he testified that he had smoked phencyclidine (PCP) shortly before the crime and that he had no recollection of the homicide. He defended on grounds that, as shown by his PCP intoxication and his bizarre conduct immediately before and after the homicide, his mental ability had been so impaired that he had neither premeditated nor intended to kill. In this effort, he was aided by post-arrest medical records showing, among other things, a high level of PCP in Jackson's bloodstream (160-176 ngs./ml.), and the testimony of hospital nurses and a doctor who had observed and treated him after his arrest. In addition, the defense presented the opinion of an expert on PCP, psychiatrist Orm Aniline. He testified about the general effects of PCP on consciousness, including that of amnesia. He further testified, in light of the particular evidence in the case, about the effects PCP would have exerted on someone who had ingested as much as Jackson had, and who behaved like Jackson, on the day of the murder. The prosecution pointed to Jackson's objective conduct and statements at the time of the crime as manifesting his ability to think clearly and purposefully, and countered the claim of

memory loss with evidence that Jackson, in the hours and days following the crime, had made statements that inadvertently betrayed his own actual recollection of the events of the crime. The jury found Jackson guilty as charged.

At the penalty phase of the trial, the prosecution introduced further "aggravating" evidence that Jackson had committed forcible sodomy while in the Army, that he previously had assaulted another policeman, and that he had suffered a prior felony conviction for burglary. The defense also produced further "mitigating" testimony, from Jackson's mother and his wife, about his character and personal history.

The trial judge instructed the sentencing jury to consider all the evidence, including that adduced at the guilt phase of the trial, and the arguments of counsel. And defense counsel argued to the jury that, among other factors, Jackson's PCP use and intoxication were "mitigating" circumstances. The jury, however, returned a death-penalty verdict.

The California Supreme Court affirmed Jackson's conviction and sentence on appeal in December 1989. This Court denied Jackson's petition for certiorari. 498 U.S. 881 (1990).

3. The Habeas Corpus Proceedings.

The federal district court appointed new counsel for Jackson in February 1992. More than a year later, in March 1993, Jackson filed a federal petition for a writ of habeas corpus, alleging among other things that Jackson's defense lawyer in numerous ways had rendered unconstitutionally ineffective assistance in both the guilt and penalty phases of the state-court trial. The district court determined that those claims, and others, had not first been presented and "exhausted" in the State court. So, in August 1993, Jackson presented those ineffective-counsel claims to the California Supreme Court for the first time. In 1995, the State court rejected the claims, both "on the merits," and also on the express ground that the

presentation of those claims in state court had been "untimely." This Court denied Jackson's petition for certiorari. 516 U.S. 965 (1995).

Upon re-initiation of federal proceedings in 1995, the district court rejected the State's argument that, given the state-court procedural ruling, the ineffective-counsel claims were barred from federal review. The district court held an evidentiary hearing on the ineffective-counsel claims, and on Jackson's claim that new, post-trial scientific developments now demonstrated that his PCP intoxication had been so severe as to render him factually "innocent" of the murder on mens rea grounds.

In 1997, after the nine-day hearing, the district court denied relief entirely. The court fully rejected petitioner's multi-faceted claim that defense counsel had rendered "ineffective" assistance in numerous respects at the guilt phase. The court also rejected a similarly multi-faceted claim that counsel had been ineffective at the sentencing hearing (a claim that, given the court of appeals' later grant of relief as to the death sentence, is not at issue in Jackson's certiorari petition). Last, the district court rejected the claim that "new" scientific evidence proved Jackson to be "innocent" of the murder.

4. The Ninth Circuit Appeal.

Jackson appealed. The Ninth Circuit heard oral argument in October 1998 and issued its opinion nineteen months later, in May 2000. The panel unanimously affirmed the denial of relief on Jackson's claims that new scientific advances prove his innocence and that he suffered from ineffective counsel at the guilt phase of his trial. Among other things, the panel specifically validated defense counsel's decision to rely, at the guilt phase, on the testimony of psychiatrist Aniline about the potential effects PCP exerted on Jackson in light of the eyewitness and medical-record evidence of his behavior and condition at the time of the crime, even though Dr. Aniline had

not personally interviewed Jackson. Conversely, the panel validated counsel's decision to forgo testimony from another psychiatrist, Dr. John Mead, even though he had in fact interviewed Jackson prior to trial. The panel explained that Dr. Mead's testimony would have been risky. Further, the panel recognized, Dr. Mead's opinions about Jackson's intoxication and claimed memory loss, views gleaned from the doctor's testimony outside the jury's presence at trial, were not significant enough to have affected the guilt phase. The panel concluded that, because the doctor had not testified at the federal hearing, "there is no basis for concluding that Dr. Mead would have been more helpful." (9th Cir. Slip Op. 4999.) In addition, the panel rejected Jackson's claims that defense counsel had failed to investigate and rebut certain incriminating evidence about Jackson's statements and behavior at the time of the homicide and the arrest. The unanimous panel concluded that, even if it were assumed arguendo that counsel had been incompetent, Jackson had not shown that impeaching or rebuttal evidence really had been available and/or that there was no "reasonable probability" that the alleged deficiencies in counsel's performance affected the result at trial. (Slip Op. 4995.) The panel also upheld the district court's rejection of Jackson's "actual innocence" claim, finding that Jackson's evidence did not meet even a "probable innocence" standard. (*Id.* at 5013.)

(In a 2-to-1 portion of opinion, the panel reversed the district court and ordered relief from the death sentence on the claim of ineffective counsel at the penalty hearing. That ruling, as noted earlier, is not the subject of Jackson's certiorari petition. The Warden, however, has filed a pending petition for certiorari on that issue, in *Woodford* v. *Jackson*, No. 00-618.)

REASONS THE WRIT SHOULD BE DENIED

Question 1.

Certiorari should be denied on Question 1 because: it seeks review merely of the application of settled law to the particular facts of this case; the underlying constitutional claim of ineffective-counsel was never fairly presented to the state court, was forfeited under state procedural law, and now is barred in federal habeas corpus proceedings; and the record demonstrates that the state supreme court, the federal district court, and the federal court of appeals correctly rejected the ineffective-counsel claim on the merits.

Petitioner Jackson seeks review, in Question 1 of his certiorari petition, on the issue of whether his defense lawyer provided unconstitutionally "ineffective" assistance at the guilt-phase of Jackson's death-penalty trial. As this Court recently has observed, the precedent of *Strickland v. Washington*, 466 U.S. 668 (1984), sets out this Court's "clearly established" rule governing claims of unconstitutional ineffectiveness of counsel. *Williams v. Taylor*, 120 S.Ct. 1495, 1512 (2000). Jackson's petition neither questions the validity of the *Strickland* rule, nor claims that the court of appeals applied a different, incorrect rule to his Sixth Amendment claim in this case. (Pet., pp. 5-6.) Because it merely quarrels with the straight-forward application of clearly established law to the "particular facts" of the case, Question 1 does not justify issuance of the writ of certiorari. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

*

Moreover, a grant of certiorari on the *Strickland* issue would be futile, for there are significant procedural impediments that would prevent reaching that issue. The first

is that, as the California Supreme Court explicitly ruled, Jackson forfeited his Sixth Amendment claim under state procedural law. Jackson did not bring to the state court's attention any federal claim of ineffective-counsel until August 1993, almost a decade after the trial, almost four years after the conclusion of the state appeal in 1989—and at least another half-year after he apparently had perfected his claims to his own satisfaction but chose to bring them, in an improper "unexhausted" petition in March 1993, to the federal court instead. Left with no other choice by the district court, Jackson finally filed in state court in August 1993.

By that time, Jackson and his various post-conviction counsel were on long-standing notice that the state court required an explanation and justification for any significant delay in seeking habeas corpus relief. See *In re Stankewitz*, 40 Cal.3d 391, 391-397, 220 Cal.Rptr. 382, 708 P.2d 1260 (1985); *In re Swain*, 34 Cal.2d 300, 302, 209 P.2d 793 (1949). This rule had been re-affirmed in June 1989, in the publication of the California Supreme Court "Policies Regarding Cases Arising From Judgments of Death." Moreover, shortly before Jackson filed his ineffective-counsel petition, the California Supreme Court again spelled out the habeas corpus petitioner's obligations to file a collateral attack without substantial delay, and to allege with specificity facts showing when the petitioner had become aware of his claims and why he could not reasonably have brought it to the court's attention without the delay. See *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993).

Indeed, in circumstances very similar to Jackson's in *Clark*, the state supreme court deemed the petitioner's claims forfeited because: (1) the state petition had been filed more than a year after the finality of the state appeal, rather than within 90 days of the reply brief in the direct appeal, as approved in the Court's Policies; (2) the petitioner had not alleged with specificity when he became aware of the factual and legal bases of the new claims; and (3), in the face of those facts, he made

no effort to explain and justify the delay. (*Id.* at pp. 760-761, 785-787, 799.) Nevertheless, when finally constrained to file in state court in August 1993, Jackson failed to identify with specificity when he had become aware of the bases of his ineffective-counsel claims, which necessarily involved the conduct of his own lawyer ten years earlier. (Vol. 8 Supp. Excerpts of Record [SER] (9th Cir. Case No. 97-99032) 1804-1805.) Nor did Jackson provide the factual basis for any asserted justification for withholding known claims from the state court. (*Id.*) Nor did he ever seek to supply that information to the state court during the year-plus period the petition remained pending there. Not surprisingly, then, the California Supreme Court rejected Jackson's ineffective-counsel claims on the independent state-law procedural ground that it was "untimely." (8 SER; U.S. Dist. Ct. Docket, No. 108.)

Because there thus was an independent state-law procedural ground adequate to support the denial of petitioner's ineffective-counsel claim, that claim should have been deemed barred in the federal habeas corpus court in the absence of a showing of good "cause" for the default, and prejudice from it, or a demonstration of actual innocence. *Coleman* v. *Thompson*, 501 U.S. 722, 729-32, 753, 757 (1991). Instead, over the Warden's repeated arguments, the district court and the Ninth Circuit erroneously refused to honor the state-law procedural judgment. Nevertheless, the procedural-bar issue here remains a significant obstacle to even reaching the merits of the ineffective-counsel claim petitioner presses in his certiorari petition. See *Lambrix* v. *Singletary*, 520 U.S. 518, 524 (1997).

Finally, some of Jackson's individual claims of ineffective-counsel involve allegations of fact and law that have never been presented at all, let alone "fairly presented," in the state court to this day. Even if the state court's procedural ruling on Jackson's 1993 broad ineffective-counsel claim were deemed inadequate to bar the claim in federal court, these new individual claims of ineffectiveness would still remain ineligible as bases for habeas corpus relief in the federal court,

either because they would be deemed forfeited under current state law, see *Teague* v. *Lane*, 489 U.S. 289, 298-9 (1989); *Harris* v. *Reed*, 489 U.S. 255, 268-70 (conc. op.) (1989), or because they are claims as to which available state remedies have not yet been "exhausted," *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982). The Warden will identify these new claims in the following point-by-point response to petitioner's ineffective-counsel argument.

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Strickland, of course, required Jackson to make two separate, affirmative showings. One, he had to show that, in light of a "contemporary assessment" of all the circumstances, counsel's performance was unreasonable under prevailing professional norms. 486 U.S. at 688; *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Two, he had to show a "reasonable probability" that, but for counsel's deficient performance, the sentencing decision would have been different. *Id.* at 695; see *Strickler v. Green*, 527 U.S. 263, 291 (1999). A glance at Jackson's Sixth Amendment claim reveals the obvious reasons the state supreme court, the federal district court, and the federal court of appeals all rejected it.

Jackson first claims that trial counsel failed to "present available and critical psychiatric testimony." (Pet. 6-10.) He argues that counsel erred (a) in not instructing defense psychiatrist Mead to forgo mentioning certain facts about Jackson's background in the doctor's report and (b) in then declining to call the doctor as a witness out of fear he would be subjected to damaging cross-examination on those facts. But it is not for the lawyer to determine what an expert deems appropriate to say in a report embodying his own expertise; and it would be fatuous for a lawyer to believe that merely eschewing information in an expert's written report will prevent cross-examination of the expert on those matters in front of the jury. As the district court and the Ninth Circuit properly found,

the decision to forgo Mead's risky testimony under the circumstances was a reasonable tactical choice. Moreover, as the lower courts also recognized, Mead could have offered little helpful testimony anyway. (USDC Op. 71; 9th Cir. Slip Op. 4998-5000.)

Jackson claims, next, that counsel underutilized psychiatric expert Aniline. He suggests that, because Aniline did not interview Jackson, the doctor could not directly testify about Jackson's mental state. He also says that counsel did not elicit as much favorable testimony from Aniline as the latter was prepared to give. Jackson ignores his failure to ever raise this claim in state court, or even in his federal habeas corpus petition, at all—a failure that disqualifies the claim in these proceedings. He further ignores the fact that counsel sought the advice of Aniline himself, the medical expert, to determine whether an interview would be advisable. He also ignores the inconvenient reality that, under California law, Aniline could not have opined directly about Jackson's actual mental state anyway. See Cal. Pen. Code, § 29. Most important, he almost wholly ignores the fact that, at trial, defense counsel posed to Aniline a long hypothetical question incorporating the facts of Jackson's condition at the time of the murder, and in that way gave Aniline a full opportunity to bring all his expertise to bear on the question of Jackson's mental condition at the time of the crime.

Jackson next claims that trial counsel was ineffective in failing to controvert evidence that, contrary to the defense claim of intoxication, blackout, and lack-of-memory, Jackson in fact had made statements in the police confrontation moments after the shooting—e.g., "Now I'm gonna kill all the fucking pigs"—indicating a present awareness of his surroundings and his specific intention to kill. (Pet., pp. 4, 11-13.) Contrary to Jackson's allegation that defense counsel conducted no investigation of the statement (Pet., pp. 11, 12), the fact is that trial counsel instructed his investigator to interview the police and civilian eyewitnesses identified in the police reports, and

the investigator, albeit unsuccessfully, sought to do so. Nor did Jackson's federal habeas corpus counsel ever produce any eyewitnesses to testify that they did not hear any such threatening statement despite having been in position to do so. At trial, one arresting police officer testified that the threat was made, a second said he had heard no such threat, and a third gave testimony that never mentioned it. From all this record shows after eighteen years, that was the entirety of the available significant evidence on the subject, and the jury heard all of it.

Next, Jackson claims that his trial lawyer incompetently called to the stand eyewitness Mitchell, allegedly never interviewed earlier by the defense, who ended up giving assertedly surprising but damaging cross-examination testimony that Jackson slyly had tricked Officer Wrede into letting down his guard right before Jackson shot him. (Pet., pp. 4, 14-16.) The habeas corpus testimony reflects two versions of events: one, that the defense investigator sought to interview the young witness beforehand but was rebuffed by the witness' mother; and, two, that defense counsel ultimately was informed that the boy indeed had been interviewed and would testify in conformity with the statement attributed to him in the police reports. In any event, Jackson offers only speculation that the allegedly surprising testimony actually would have been revealed in a prior interview; indeed, one of the premises of Jackson's argument is his allegation that the cited statement had not been revealed in the witness' earlier statement to the police. Counsel obtained helpful information from the witness on direct examination; but no lawyer can guarantee against surprise testimony on cross-examination. Indeed, in the Wardens' view, the *Strickland* rule does not provide the defendant with what would amount to "windfall" protection against truthful and reliable testimony, regardless of whether it is harmful. See *Lockhart* v. *Fretwell*, 506 U.S. at 372. It would take, moreover, an improperly retroactive "new rule" to allow habeas corpus relief on such a controversial point in this case. See *Teague* v. *Lane*, 489 U.S. at 310-11 (plurality op.); accord, *Lambrix*, 520

U.S. at 527. Regardless, as the Ninth Circuit recognized, other witnesses had testifed to the same effect for the prosecution, so there is no "reasonable probability" that the result would have been different anyway. (9th Cir. Slip Op. 5004-5005; see also USDC Op., p. 60.)[2]/

Finally, in assessing *Strickland* prejudice, Jackson seeks to "accumulate" the effect of the alleged culpable conduct of defense counsel. (Pet., p. 17.) Whether this may be done under *Strickland* presents, at the very least, a question of retroactivity under the *Teague* "new rule" doctrine. But the simpler answer is that, as all the lower courts in this case have determined, Jackson suffered no violation of his constitutional rights at the guilt phase at all.

Question 2

Certiorari should be denied on Question 2 because it raises no important question of law, is not squarely raised by the facts of the case, and proves merely academic in light of the many alternate grounds that support the rejection of petitioner's freestanding habeas corpus claim of "factual innocence."

Petitioner argues that the court of appeals should not have reviewed deferentially the district court's concededly "discretionary" decision to refuse to appoint yet a third medical expert, a neurologist, to testify for Jackson at the federal

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[2] Jackson complains that defense counsel failed to counter the alleged surprising testimony by calling to the stand the police officer who took the original report from Mitchell and other civilian eyewitnesses to the homicide. (Pet. 15-16.) Jackson, however, never claimed in state court or in the federal petition that counsel's conduct amounted to ineffective assistance in this regard, and it is too late for him to do so now. See *Rose* v. *Lundy*, 455 U.S. 509. Anyway, he merely speculates about what these witnesses would say. He never called them in the federal habeas corpus proceedings to find out.

hearing; he says the exercise of that discretion was tainted by the district court's erroneously harsh misunderstanding of petitioner's burden of proof on a "freestanding" habeas corpus claim of "factual innocence." According to Jackson, the district court applied an alternate "reasonable doubt" and "clear and convincing" evidentiary standard, whereas the "true" standard is that of mere "probable" innocence. (Pet., pp. 17-21.) There are many fundamental reasons why certiorari should not be granted to consider the superficial question of whether deferential review of the denial of the funding request was appropriate in this case.

First, and more basic than the funding-request issue, there is no such a thing as a valid freestanding claim of "innocence," as opposed to a claim of unconstitutional error at trial, in a 28 U.S.C. § 2254 case. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963).

Second, even if there could be such a claim, it would not lie where, as here, the State otherwise provides an avenue of relief through executive clemency. See *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993); Cal. Const., art. V, § 8.

Third, even if it were unconstitutional to execute an innocent person, there still would be no such thing as a valid freestanding claim of innocence, under § 2254, to avoid a criminal conviction and imprisonment, as Jackson seeks to do in his certiorari petition in this case. Cf. *Herrera*.

Fourth, even if such a claim could be valid, Jackson offers no reason to believe such a claim could validly depend upon retrospective expert testimony about the defendant's mental state as opposed to proof that someone else committed the crime entirely. Cf. *Herrera*.

Fifth, even if § 2254 somehow might allow relief on a freestanding claim of innocence based on mental state, there is no basis for a federal constitutional claim where the alleged mental impairment is caused, as here, by the defendant's own voluntary intoxication. See *Montana* v. *Egelhoff*, 518 U.S. 37, 56 (plur. op.), 56-61 (conc. op.) (1996).

Sixth, the record does not establish that any particular view of the ultimate standard of proof of "innocence" actually played any role in the district court's decision to refuse to appoint a neurologist. Jackson points to the district court's discussion of the burden-of-proof issue in its ultimate decision dismissing the habeas corpus petition. (Pet., p. 20.) But that burden-of-proof decision post-dated the judge's discretionary ruling on the neurologist by many months. Jackson does not cite any other part of the record firmly showing that the judge finally had resolved the burden of proof issue by the time he ruled on the neurologist request. It thus seems reasonably possible that the judge might have applied a more-lenient standard, perhaps on a provisional basis, in ruling on the neurologist motion.

Seventh, Jackson does not establish the need for the Supreme Court to determine whether an appellate court should review deferentially a discretionary ruling made by a district judge who misapprehends a relevant burden of proof. He points to no conflict among the circuit courts of appeals on the question. Nor does not show that it is a common problem that cries out for a final resolution.

Eighth, no injustice was done to Jackson on account of the disputed ruling on the neurologist, and any error would prove harmless. See *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Here, at Jackson's behest, the parties were required to submit their experts' direct testimony by written narrative prior to the evidentiary hearing. If Jackson needed a neurologist, he should have asked for one earlier, rather than after the hearing had commenced. Jackson implies that the need arose only when it became apparent that the district judge misunderstood the allegedly-essential concept of "cognition" and indicated it would refuse to allow Jackson's expert psychiatrist to testify about it. But, in the event, the district judge in fact relented and allowed psychiatrist Aniline to testify on the subject extensively. (5SER 1336-7, 6 SER 1358-67, 1376, 1392-9; see vol. 3 Ev. Hg. Tr. 13-21, 94, 101-2; 4b Ev.

Hg. Tr. 27-8, vol. 5 Ev. Hg. Tr. 7-11, 17, 20.) And, as evidenced by the district judge's opinion rejecting the "innocence" claim and the Ninth Circuit's agreement with it, the district judge obviously understood the concept all too well for petitioner. (9 ER 2597-2601 [USDC Op. 104-108].)

The evidence that Jackson premeditated, deliberated, and intended to kill—more than enough to support even a death sentence, see *Tison* v. *Arizona*, 481 U.S. 137, 146-158 (1987)—was strong. At the time of the crime, Jackson engaged in purposeful and intricate physical activity in obtaining the policeman's shotgun and readying it for fire; by seeming at one point to relent, he cunningly lulled the officer into a false sense of security; he aimed and fired, and shot Officer Wrede dead; he announced to the arresting officers that he was going to "kill" them too; and, despite his claimed blackout or memory loss, he made repeated statement after the crime betraying his own understanding and recollection of the crime. In the federal hearing, his claim that PCP in fact had rendered him incapable of certain kinds of thought was contradicted by expert testimony, remained incompatible with the reality of his conduct and statements at the time of the crime, and has been rejected by the California Supreme Court, the federal district court, and the Ninth Circuit Court of Appeals. A neurologist talking about cognition thirteen years after the crime hardly would have made any difference.

Ninth, and finally, it appears that the alternate standards of proof discussed in the district court's opinion denying relief were correct anyway. Jackson, at best, had to prove his "freestanding" claim under an "extraordinarily high" standard. *Herrera*, at 417. His proffered standard of "probable" innocence is, by definition, not "extraordinarily high." To the contrary, he was required to prove he was "unquestionably" innocent. See *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995). The challenged ruling on the neurologist motion thus could not have been erroneously affected by the burden-of-proof ruling that petitioner ascribes to the district court anyway.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: November 17, 2000.

Respectfully submitted.

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